IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5646 of 2002
With
SPECIAL CIVIL APPLICATION No. 5707 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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LT COL (RETD) APN SINHA - Petitioner(s)
Versus
O N G C LTD & 4 – Respondent(s)

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Appearance :
MR MUKUL SINHA for Petitioner(s) : 1,
RULE SERVED for Respondent(s) : 1 - 3, 5,
MR RAJNI H MEHTA for Respondent(s) : 4,
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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 14/09/2005

COMMON ORAL JUDGMENT

Both these petitions have common question and hence are taken up for hearing and disposal and are disposed of by this common judgment.

2. Both these petitions are filed by the petitioners who were appointed as Manager (Security) by ONGC Limited by order bearing incidentally the same date, i.e. 19.05.1997. The order says that,

> ".. .. The appointment is on tenure basis initially for a period of three years from the date of appointment."

Conditions are annexed to the order. Condition No.4 reads as under:

> "4. The appointee shall be initially appointed on tenure basis for a period of 3 years in ONGC from the date of his appointment extendable by two years primarily in the corporation."

3. The relevant facts of the case are that the petitioners were appointed as Manager (Security), the services of petitioner in Special Civil Application ("SCA" for brevity) No.5646 of 2002 were extended up to 30.06.2001 and thereafter upto 30.06.2002, while the

services of the petitioner in SCA No.5707 of 2002 were extended upto 29.06.2001 and thereafter upto 29.06.2002. Before their term/tenure came to an end on 30.06.2002 and 29.06.2002 respectively these petitioners approached this Court by filing the present petitions. SCA No.5646 of 2001 was filed on 17.06.2002 while SCA No.5707 of 2002 was filed on 21.06.2002. Both these petitioners have prayed that the respondents be directed to treat the appointment of the petitioners at par with other regular employees holding the post of Manager (Security) with all benefits attached to the post and to continue the petitioners in service till they attain age of 60 years. It is also prayed by the petitioners that appointment of the petitioners, by way of tenure appointment be declared contrary to the Recruitment Rules, public policy, arbitrary and therefore violative of Article 14 of the Constitution of India.

4. Learned counsel appearing for the petitioners strenuously argued and tried to convince this Court that the respondents could not have appointed the petitioners for a fixed term. He submitted that the tenure appointment is not contemplated under the Recruitment Rules and therefore, though it is termed as tenure appointment, it is a 'regular appointment' the Court

shall declare it to be so and as a consequence thereof, the respondents be directed to allow the petitioners to continue in service till the age of 60 years, i.e. the age of superannuation.

5. The learned counsel for the petitioners further submitted that it is a matter of record that the petitioners were appointed to the post of Manager (Security) which is not a tenure post, therefore, there was no question of petitioners being appointed for 'fixed tenure' when the post of the permanent nature. He submitted that in fact what is stated in the Annexure attached to the appointment order is that the post is of temporary nature, which is different than the tenure post. Even looking to the nature of duties discharged by these petitioners there was no question of the post being of tenure nature. In fact, the duties which the petitioners were discharging are of permanent nature and they do not come to end on expiry of the term.

6. The learned advocate for the petitioners submitted that the authority under whom the petitioners were serving-Deputy General Manager (Security), Brig. (Retired) had recommended to the GGM-Head of Regional Office, Vadodara for extension of service tenure of the

petitioners. Along with the said recommendation letter he submitted letter dated 1st/ 3rd May 2002 received from the petitioner in SCA No.5646 of 2002. The learned advocate submitted that from the said letter of recommendation it is clear that the services of the petitioner were found to be satisfactory, therefore, there was no reason for which the request made by the petitioners and recommendation made by the Head of the department should not have been acceded to. Learned advocate for the petitioner also submitted that in fact this was the second recommendation as earlier a recommendation was made by the Chief Manager (P&A) to the GGM (P&A)-ER stating that the Head of Regional Office, Vadodara has made recommendations.

7. The learned advocate for the petitioner submitted that the respondents ought to have appointed the petitioner on permanent basis, as the post was permanent in nature and could not have appointed on tenure basis as the said is not stipulated in Modified Recruitment & Promotion Regulations, 1980 (hereinafter referred to as “MRPR, 1980”). He submitted that in fact the persons appointed on tenure basis is not considered to be an employee under MRPR, 1980, as the definition of the terms, 'employee' contained in Clause (h) of Regulation 2

of MRPR, 1980 does not cover appointees within its ambit. For ready perusal, the said definition is reproduced hereunder:

> “2(h) 'Employee' means and includes any person holding post in Executive cadre or non-executive category in the grade/ scales of pay as defined in Schedule-I. It does not include deputationists/ trainees/ apprentices or those engaged on casual/ contingent/ contractual/ tenure/ term basis (by whatever name they may be called or referred to) for specified job or specified period.”

The learned advocate for the petitioner submitted that according to him in view of the specific provision contained in Regulation 3(d) it was not possible for the respondents to appoint the petitioner on tenure basis because in case of appointment by any other method the same was required to be made by the Corporation, after recording reasons for the same in writing, in the matter of persons possessing special merit, qualifications or experience.

The learned advocate for the petitioner further submitted

that without changing/ modifying the designation/grade or any other term/condition prescribed in these Regulations, it was only the Board of the respondent Corporation who could have appointed the petitioners on tenure basis.

8. The learned advocate for the petitioner will all vehemence submitted that it was not open for the respondents to convert a permanent post into a tenure post. He submitted that the Central Model Standing Orders are not directly applicable to the respondent corporation, but then the analogy provided therein can be imported, there workmen are classified into various classes and an employee can be recruited in any one of those classes. Similarly, under MRPR, 1980 which govern recruitment and promotion of the employees of the corporation, 'tenure post' is not provided, hence respondents could not have created a tenure post.

9. The learned advocate for the petitioners submitted that the petitioners were appointed to the post of Manager (Security), similarly other persons were also appointed to the same posts. The petitioners enjoyed the same pay scale, dearness allowance, housing and medical facilities along with the admissible perks at par with other appointees. He submitted that there was no valid

reason for which the respondents could have appointed some persons on permanent basis and the petitioners on tenure basis.

10. The learned advocate for the petitioners relied upon the decision of the Hon'ble the Apex Court in the case of Ajay Hasia, etc. Vs. Khalid Mujib Sehravardi and others, reported in A.I.R. 1981 SC 487. The learned advocate submitted that the Hon'ble the Apex Court has held that whenever there is arbitrariness in any decision, the same offends Article 14. He submitted that in the present case the act of the respondent corporation to appoint the petitioners on tenure post is an arbitrary decision and therefore, it violates Article 14 of the Constitution of India. He submitted that the mere presence of arbitrariness in any decision is sufficient to attract Article 14 of the Constitution rendering it to be liable to be quashed and set aside. He submitted that following is the relevant part of para 16 of the aforesaid decision.

> “The basic principle which therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now what is content and reach of this great equalising

principle? It is a founding faith, to use the words of Bose, J., “a way of life”, and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law and a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness, and equality of treatment.” (emphasis supplied)

The learned advocate for the petitioners placed heavy reliance also on the extracts quoted from the judgment in the matter of Smt.Maneka Gandhi Vs. Union of India and another, reported in A.I.R. 1978 SC 597 : 1978 (2) SCR 621, which reads as under:

> “Now, the question immediately arises as to what is the requirement of Article 14: What is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. IT is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. .. .. .. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as physiologically, is an

essential element of equality or non arbitrariness pervades Article 14 like a brooding omnipresence.”

11. The learned advocate for the petitioners submitted that in the present case the action the action of the respondents of appointing the petitioners on a tenure post is an arbitrary action. More so, when there is no provision in MRPR, 1980 for such appointment and therefore, it should be held by this Court that there being arbitrary action, the same is violative of Article 14 of the Constitution of India and cannot be allowed to stand and the respondents be directed to allow the petitioners to serve till they reach the age of superannuation.

12. The learned advocate for the petitioners next relied upon a decision of Hon'ble the Apex Court in the matter of Central Inland Water Transport Corporation Limited & another Vs. Brojo Nath Ganguly and another, reported in (1986) 3 SCC 156. The learned advocate submitted that the action of the respondents of making tenure appointment is against public policy. The learned advocate submitted that he is relying upon this decision for a limited purpose to submit that whenever an act is opposed to public policy, the same is void and is required to be

quashed and set aside.

13. The learned advocate for the petitioners next relied upon a decision of the Hon'ble the Apex Court in the matter of Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and others, reported in 1991 Supp. (1) SCC 600. The learned advocate submitted that the respondent is a public undertaking and the employees of the public/ semi government undertakings, statutory corporations are the instrumentalities of the State, covered by Article 12 of the Constitution, and possess a status. He submitted that employment in such undertakings is a public employment and the society as a whole has stake and interest in it. He submitted that the employees must have service security and in cases of arbitrary termination of service, the employees are entitled to invoke rights guaranteed under Part III of the Constitution of India. He submitted that the employees have right to continue in public employment till they attain age of superannuation or in the alternative their services can be terminated only in accordance with just, fair and reasonable procedure prescribed under the Constitution or statutory provisions, rules, regulations or instructions. The learned advocate submitted that in the present case the very appointment of the petitioners on tenure basis

deprives the petitioners of the status and the right to continue in public employment and therefore, the same is required to be quashed and set aside by this Court.

14. Mr.R.H.Mehta, learned advocate appearing for the respondent-Corporation in the first instance invited attention of the Court to the order passed by the Court at the time of admission hearing of Special Civil Application No.5646 of 2002, wherein the learned Judge has taken into consideration the contents of the affidavit in reply filed by the respondents and has set out reasons in detail for refusing interim relief. He submitted that he be permitted to refer to an rely upon the said affidavit in reply at this stage of final hearing also. He submitted that the same reasons for which the learned Judge declined the interim relief are good enough for declining the final relief also and the petition be dismissed with cost.

15. The learned advocate for the respondents submitted that the petition is devoid of merit and has no substance as the very basis on which edifice is sought to be build is non existent. He submitted that the main contention of the learned advocate for the petitioners that there is no specific mention about the tenure appointment in MRPR,

1980 is misconceived. He submitted that the fact that a tenure appointment is not specifically prohibited under MRPR, 1980 the respondents can always make such an appointment. In fact the respondents have to take recourse to such appointment as and when the circumstances so warrant. He submitted that in absence of any specific prohibition for making such tenure appointment, power to make the same is implied. The learned advocate for the respondents submitted that the petitioners were appointed as a special case. He submitted that looking to the experience they possess, the appointing authority exercising its power of relaxation thought it fit to make a tenure appointment following minimum required procedure. He submitted that it is not in dispute that the petitioners accepted the said tenure appointment, way back in 1997. Not only that they also accepted two extensions to the said tenure appointment. It is only at the fag end of the extended term, that they first made a request to the authority/ corporation for continuing them as permanent appointees till they reach the age of superannuation, but as the respondent-authority/corporation did not accept their request they filed these petitions. The petitioners right from the beginning knew well that they are considered and being appointed on a tenure post. They know this fact

when two extensions were given to them. That is why in their request to the authority for allowing them to continue till the age of superannuation vide their application/letter dated 02.02.2002, they mentioned that,

> "6. In view of the above it is requested that my case may please be considered sympathetically on merits of the case for an appointment as intelligence professional and **my service tenure extended upto superannuation (at 60 years of age) in March 2004 or as deemed appropriate."** (emphasis supplied)

Similarly, in a request letter dated 1st/ 3rd May 2002 it is mentioned that,

> "2. My existing service tenure will be expiring on 30.06.2002.. .. I may please be granted a further extension of service tenure upto my superannuation date, i.e. 14th March 2004 or the period deemed appropriate." (emphasis supplied)

16. The learned advocate for the respondents submitted that both the communications dated 13.03.2000 and 30.03.2001 mentioned in no uncertain terms that:

> “It is hereby conveyed for extension in the period of tenure appointment for one year in respect of following Ex Army officer engaged on tenure basis.”

17. The learned advocate for the respondents submitted that even though the 'tenure appointees' are excluded from the definition of the term, 'employee' in MRPR, 1980, it cannot be argued that the respondent corporation has no power to make tenure appointment. The learned advocate for the respondents submitted that if this contention is accepted it will bring hazardous consequences because then the corporation will not be able to engage anybody as casual/ contingent/ contractual/ tenure employees. He submitted that even at the cost of repetition he be allowed to submit that, power to appoint on 'tenure basis' does not flow from MRPR, 1980 and therefore, to argue that as there is no specific power conferred on the respondents to make appointment on tenure basis the petitioners could not have been appointed on tenure basis, is not only strange but also unknown to the service jurisprudence.

The learned advocate for the respondents next submitted

that in fact what weighed with the learned Judge for admission of this petition was the submission of the learned advocate for the petitioners which is recorded by the learned Judge as under:

> “.. .. on this issue, petitions are also pending in different High Courts as argued by Mr.Sinha for the petitioner. .. ..”

The learned advocate for the respondents submitted that today the position is that Special Civil Application No.4809 of 2000 filed before the High Court of Bombay was withdrawn on 04.10.2000. Writ Petition (Civil) No.6779 of 2000 was dismissed by Gauhati High Court on 11.06.2003. CW No.938 of 2003 filed in the High Court of Delhi referred to in the above Gauhati High Court judgment was also dismissed. The learned advocate for the respondents submitted that to the best of his information no petition filed in any High Court is allowed. He submitted that he is not able to obtain a copy of decision of Delhi High Court, but a copy of the judgment and order dated 11.06.2003 in Writ Petition (Civil) No.6779 of 2000 by the Gauhati High Court, is available and the same is placed on record for perusal.

18. The learned advocate for the respondents submitted that at the time of appointment of the petitioners the authorities had undertaken the process for tenure appointment only and not for direct recruitment. He further submitted that if appointments of the petitioners were to be on permanent basis, the authorities would have undertaken the process for direct recruitment and applications from eligible persons from all over India would have been called for so as to give a fair opportunity to all eligible candidates. He further submitted that if appointments of the petitioners are treated to be permanent appointments instead of tenure appointments the same will amount to denial of an opportunity to the eligible candidates. The learned advocate for the respondents submitted that for filling up the vacancies by direct recruitment, procedure is prescribed under Regulation 6(1), which was not followed because on account of emergent situation authorities were to give tenure appointment only. He further submitted that the petitioners were over-aged as they were above 44 years of age but still they were considered because they were to be offered tenure appointment. The appointment of the petitioners were approved by CMD under clause 3(d) as 'tenure appointment'. The learned advocate submitted that besides the petitioners had also accepted the appointment

with full knowledge of it being for a fixed term of three years with a clause for extension. Even the subsequent conduct of the petitioners strengthens this conclusion as they themselves requested for extension of their tenure till they reach the age of superannuation.

The learned advocate for the respondents submitted that in fact the petitioners from their conduct are estopped from contending/pleading that their appointment was on permanent basis. He submitted that the petitioners cannot be allowed to approbate and reprobate. He submitted that the petitioners have no right to seek extension of tenure appointment. The learned advocate asserted that in the respondent-corporation tenure appointment is not extended beyond a period of five years. He submitted that in fact the petition is filed on an after-thought, and misdirected legal advice.

19. The learned advocate for the respondents while replying to the submissions made by the learned advocate for the petitioners submitted that Industrial Employment (Standing Orders) Act, 1946 is not applicable to the petitioners as they were appointed as 'Manager-Security'. The learned advocate for the respondents submitted that the submission made on behalf of the petitioner that

tenure appointment of the petitioners is illegal and arbitrary in view of the decision of the Hon'ble the Apex Court in the matter of Ajay Hasia (supra), is not correct. The learned advocate for the respondents submitted that the said decision has no application to the facts of the present case. Learned advocate for the respondents submitted that the judgment in the matter of Central Inland Transport Corporation Limited (supra) is also not applicable to the present case. The learned advocate submitted that in fact the case of the petitioners is covered by a decision of the Hon'ble the Apex Court in the matter of Dr.L.P Agarwal Vs. Union of India and others, reported in A.I.R. 1992 SC 1872. The learned advocate submitted that the Hon'ble the Apex Court was pleased to hold that the concept of 'superannuation' does not apply to a tenure post. The learned advocate for the respondents submitted that in the case before the Hon'ble the Supreme Court an appointment order was issued for a period of five years and there it was mentioned that the appointment is for a period of five years or till the appointee reaches the age of 62 years. The Hon'ble the Apex Court was pleased to hold that even then the appointment does not cease to be a tenure appointment. The learned advocate submitted that in the facts of the present case the appointment of

the petitioners was a tenure appointment. It was for a period of three years with a clause for extension for a further period of two years.

20. The learned advocate for the respondents next relied upon a decision of the Hon'ble the Apex Court in the matter of Director, Institute of Management Development, U.P. Vs. Smt.Pushpa Srivastava, reported in A.I.R. 1992 SC 2070. He submitted that the Hon'ble the Apex Court was pleased to hold that an ad hoc appointment on contractual basis for a period of six months which was continued for more than a year, will not be a ground to claim regularisation in service. The learned advocate submitted that whereas in the present case the appointment was for a period of three years with a clause for extension and on expiry of the extended term the appointment came to an end. He submitted that therefore, the petitioners cannot claim extension of their tenure appointment till they reach the age of superannuation.

21. The learned advocate for the respondents next relied upon a decision of the Hon'ble the Apex Court in the matter of Dr.L.M. Nath Vs. Dr.S.K. Kacker and others, reported in (1996) 1 SCC 229. The learned advocate submitted that there the Hon'ble the Apex Court was

pleased to hold that in the matters of tenure appointment there is no right to continue. He submitted that the Hon'ble the Apex Court was pleased to hold that where tenure of the incumbent has expired there is no order expressly extending the same, such an incumbent has no right to continue in the post. He submitted that the said decision of the Hon'ble the Apex Court applies to the facts of the present case and the petition be dismissed.

22. The learned advocate for the respondents next relied upon a decision of Division Bench of this Court in Letters Patent Appeal in the matter of Nareshkumar Vs. ONGC Limited and others, reported in 2001 II CLR 733.

The facts of the case before Division Bench were that the person was appointed as a pharmacist in a walk-in-interview to work as pharmacist in a dispensary of the respondent on contract basis for a period of one year. An agreement was executed by the petitioners to serve only for one year. However, the contractual agreement was extended till 31st July 2001, as process to fill up the post of pharmacist by regular selection could not be completed. Later on, the services of the petitioner-pharmacist were terminated. A writ petition was filed seeking a writ of certiorari of any other appropriate

writ, order or direction to declare that the agreement got executed from the petitioners was unconstitutional and that the petitioner had acquired temporary status and therefore, he should be granted consequential relief. The learned Single Judge dismissed the writ petition against which a Letters Patent Appeal was filed and in that the Division Bench confirmed the view taken by the learned Single Judge that the impugned agreement was not contrary to the provisions of the Indian Contract Act, Industrial Disputes Act or Article 14 of the Constitution of India. The learned Single Judge was also pleased to hold that there was no retrenchment in view of section 2(oo) (bb) of the Industrial Disputes Act, that there was nothing on record to indicate that the petitioner was appointed as a temporary employee of the respondent and therefore, no relief can be granted in a petition filed under Article 226 of the Constitution of India. The learned advocate for the respondents submitted that in the case on hand the petitioners were given tenure appointment, as submitted hereinabove by exercising powers for the same by the CMD. The same was accepted by the petitioners with full knowledge. Not only that neither during the tenure of initial appointment or three years nor within the period, for which appointment was extended, i.e. two years, they ever raised any dispute in this regard. On

the contrary, the petitioners prayed for extension of their tenure appointment till they reach the age of superannuation. This shows that they were in know of the fact that their appointment was a tenure appointment. The learned advocate submitted that in view of the aforesaid facts and situation the petition be declared to be a misconceived one.

23. The learned advocate for the respondents next relied upon a decision of the Hon'ble the Apex Court in the matter of C.S.I.R. and others Vs. Dr.Ajay Kumar Jain, reported in (2000) 4 SCC 186, wherein the Hon'ble the Apex Court was pleased to hold that a person who was appointed as Pool Officer under Scientists' Pool Scheme or Scientist (Fellow) for Major Projects on contract basis for a limited period, is not entitled to regulation of his services or absorption in CSIR. The learned advocate submitted that the facts of the case on hand are akin to the facts of the case before the Hon'ble the Apex Court and as was held by the Hon'ble the Apex Court appointee is not entitled to regularisation of his services or absorption, be held in the case of present petitioners also.

24. From the submissions of both the learned advocates

and the facts of the case it clearly emerges that the appointment of the petitioners was on temporary basis. It is also apparent that the appointment was given to the petitioners without following the procedure required to be followed for direct recruitment n permanent basis. Looking to the experience possessed by the petitioners, CMD approved their tenure appointment. It is also on record that the petitioners were in full know of the fact that their appointment was a tenure appointment only. Not only that they did not complain about the same during the initial period of appointment, but happily accepted two extensions given to them. Even at a later stage they tried to persuade the authorities to extend their tenure appointment till they reach the age of superannuation. The contention raised by the petitioners that there being no specific provision to make a tenure appointment, the authorities cannot make such appointment is without any substance, and the submission is not only misplaced but also misconceived. In service jurisprudence tenure appointments are not unknown. Therefore, to hold that as there is no specific provision made empowering the authority to make tenure appointment, the appointment so made shall be treated to be and declared to be a permanent appointment, cannot be accepted.

25. In view of the aforesaid discussion this Court finds that there is no substance in these petitions and hence these petitions fail. Both these petitions are dismissed. Rule is discharged with no order as to costs.

(RAVI R. TRIPATHI, J.)

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